

WHAT CAN THE UNITED STATES LEARN FROM THE CANADIAN MEANS TESTING SYSTEM?

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Unlike the United States, Canada has never adopted a “fresh start” policy in the American sense with respect to individual bankrupts. Rather, from 1919 onwards, Canadian bankrupts have been obliged to surrender, for distribution to their creditors, surplus income and nonexempt property acquired by them prior to the discharge order, as well as after discharge from bankruptcy if required as part of the discharge order. Important changes were made to these provisions in 1992 and 1997.

The author compares the current Canadian means testing requirements with those adopted in BAPCPA and notes that the Canadian scheme serves a very different purpose from the BAPCPA requirements. So far as the actual means tests are concerned, the author expresses the view that the Canadian test is substantially less generous than the BAPCPA test and he concludes that the United States has little to learn from Canada unless the United States is minded to adopt even more basic changes in its fresh start philosophy than those appearing in BAPCPA.

As I understand it, my role at this conference is twofold. First, I am asked to describe the current Canadian means testing system for individuals seeking bankruptcy relief. Second, I am to state my opinion about what I believe the United States can learn from the Canadian approach and the Canadian statutory regime.

The first part of my role is conceptually fairly straightforward, though not as simple as one might wish because of the number of Canadian statutory provisions and supporting directives and forms, and because it is difficult for an academic to try to capture all the nuances of

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bankruptcy practice. The second part of my paper is much more challenging, but the bottom line appears to be this: unless the United States is willing to abandon its fresh start philosophy, even more than it already has under the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), it has little to learn from Canada. The two means testing systems differ in almost every critical respect. So far as the actual mechanics of computing a debtor's surplus income go, the Canadian experience shows that means testing can be greatly simplified as compared with the laborious calculations and form filling mandated under BAPCPA; however, the simplification comes at a price. It means that if the United States were to follow the Canadian route, the debtor would not receive the numerous deductions permitted under the 2005 U.S. legislation. Even more important, the benchmark for determining whether the means test applies at all would not be the median income for residents of the debtor's state at the time of the bankruptcy petition applied in BAPCPA but the Low Income Cut Off (LICO) figures used in the Canadian legislation. For reasons I will explain later, the simpler Canadian provisions (and their attendant ambiguities) have not engendered much controversy so far. Nonetheless, I believe it is safe to assume that this calm would not last if the United States were minded to travel the same road.

I. THE CANADIAN PERSONAL INSOLVENCY REGIME¹

Before describing the current Canadian means testing regime, I must first explain the general structure of Canada's insolvency legislation and our treatment of personal insolvencies.² In Canada, the federal government has exclusive jurisdiction in matters of bankruptcy and insolvency law.³ Canada's federal system of government was established in

1. The Canadian insolvency statistics, and to some extent the legislation, distinguish between individual or personal insolvencies and consumer insolvencies. Personal insolvency involves an individual who goes bankrupt under Part II or makes a proposal under Part III. Division 2 of the Canadian Bankruptcy and Insolvency Act (BIA), R.S.C. 1985, c. 31 as am. by S.C. 1991, c. 46, therefore includes a small percentage of individual debtors engaged in professional or business activities, including self-employed individuals. A consumer insolvency involves an individual whose majority (50% or more) of debts were incurred in relation to personal or family use or consumption activities. The different terminology used in the Canadian and United States legislation—bankruptcy and insolvency—frequently causes confusion in comparing Canadian and American statistics. OFFICE OF THE SUPERINTENDENT OF BANKR., PERSONAL INSOLVENCY TASK FORCE: FINAL REPORT 97 n.2 (Aug. 2002) [hereinafter FINAL REPORT], available at [http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/pitf.pdf/\\$FILE/pitf.pdf](http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/pitf.pdf/$FILE/pitf.pdf).

2. For a detailed account, see JACOB S. ZIEGEL, COMPARATIVE CONSUMER INSOLVENCY REGIMES: A CANADIAN PERSPECTIVE ch. 2 (2003) [hereinafter ZIEGEL, CCIR]. The Canadian Parliament approved a major amending bill, Bill C-55, to Canada's insolvency legislation on November 23, 2005. See Jacob S. Ziegel, *The Travails of Bill C-55*, 42 CAN. BUS. L.J. 440 (2005). However, the Act cannot come into effect before June 30, 2006, and not until after it has been referred to the Canadian Senate for detailed study and a report. *Id.* at 442. Since the Act is not yet in force, its provisions are ignored in this paper.

3. Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3, s.91, reprinted in R.S.C. 1985, app. II, No. 5.

1867.⁴ Its first insolvency act was adopted in 1869 and amended in 1875.⁵ Both the original Act and the amending Act were heavily criticized on the grounds of alleged abuses. Consequently, the Act was repealed in 1880.⁶ Between 1880 and 1919, Canada did not have any personal federal insolvency legislation.⁷ Instead, the provinces were left to adopt legislation providing for voluntary assignments of property by the debtor for the benefit of the debtor's creditors. The legislation was not predicated on the debtor being insolvent and the fiction was maintained that it was not insolvency legislation for constitutional purposes.⁸ The provincial legislation only provided the debtor with relief from creditor pressures; it did not (and constitutionally could not) guarantee discharge of the debtor's remaining debts after the debtor's property had been realized and the proceeds distributed among the debtor's creditors.⁹

In 1919, the federal government brought the thirty-nine year legislative hiatus to an end with the adoption of the Bankruptcy Act of that year.¹⁰ The 1919 Act was closely modeled on the British Bankruptcy Act of 1914 and largely reflected the same philosophy with respect to the treatment of personal insolvencies.¹¹ So far as the topic of this paper is concerned, the key features of the 1919 Act were the following. First, the Act permitted both voluntary and involuntary bankruptcies and, unlike the British Act, applied to corporate as well as personal insolvencies. Second, all of the debtor's property, both present and future, acquired by, or accruing to, the bankrupt prior to the bankrupt's discharge, became part of the estate subject only to exemptions whose scope and amount were determined by the provincial law of the bankrupt's residence at the time of the bankruptcy. Third, the bankrupt was not entitled, as of right, to a discharge of his remaining debts after his nonexempt assets had been realized for the creditors' benefit. Instead, the granting of a discharge and the terms on which it was granted were in the court's discretion. Moreover, in an important range of cases, the court was not free to grant an unconditional discharge even if the judge thought it appropriate to make such an order. Fourth, the trustee in bankruptcy (trustee) responsible for administering the estate was not a government functionary but a licensed professional operating in the private sector, usually

4. *Id.*

5. 32 & 33 Vict., c. 16 (1869); 38 Vict., c. 17 (1875).

6. 43 Vict. c. 17 (1880).

7. The federal government adopted the Winding-Up Act in 1882 to provide for the winding up of insolvent companies. The Act still exists and is now known as the Winding-Up and Restructuring Act. See R.S.C. 1985, c. W-11, as am. The Act is little used in practice and most corporate insolvencies now proceed under the BIA or under the Companies' Creditors Arrangement Act (CCAA). See R.S.C. 1985, c. C-36.

8. *Att'y Gen. of Ont. v. Att'y Gen. for the Dominion of Can.*, 1919 A.C. 13, 27 (P.C. 1894) (appeal taken from Ont.). The Ontario courts were deeply divided over the question. See *id.*

9. *Id.* at 28-30; ZIEGEL, CCIR, *supra* note 2, at 14.

10. An Act Respecting Bankruptcy, S.C. 1919, c. 36.

11. Thomas G.W. Telfer, *The Canadian Bankruptcy Act of 1919: Public Legislation or Private Interest*, 24 CAN. BUS. L.J. 357 (1995).

with an accounting background. Reliable Canadian interwar statistics are not available, but the available evidence indicates that the number of annual personal insolvencies never exceeded 5000 and probably was much less.¹²

The 1919 Bankruptcy Act was revised in 1949¹³ but the basic philosophy of the 1919 Act remained intact. The same is true of the many changes that have been adopted since 1949. However, the actual operation of the bankruptcy legislation has been deeply influenced by the rapid increase in the number of personal insolvencies since the early 1970s.

II. IMPACT OF CONSUMER CREDIT GROWTH

As late as 1970, the number of consumer bankruptcies (2732) was less than the number of business bankruptcies (2927).¹⁴ Since then, the number of personal insolvencies has escalated rapidly and amounted to 102,660 in 2005.¹⁵ Prior to 2005, Canada was second only to the United States in the rate of personal insolvencies among countries in the Western hemisphere. The Canadian rate grew from 1.4 per thousand of population in 1987 to 4.0 in 2004.¹⁶

Several factors explain the rapid growth in the number of personal insolvencies. The single most important factor is undoubtedly the ready availability of consumer credit to all sectors of Canadian society, particularly in the form of credit cards. The statistics show a close correlation between the number of consumer insolvencies and the volume of outstanding consumer credit.¹⁷ A second factor is the ease of filing for bankruptcy in Canada—where it is even easier than it was in the United States before BAPCPA. Unlike the United States, in Canada, voluntary bankruptcy petitions¹⁸ are almost invariably prepared by a trustee, and just as invariably, the same trustee is named as trustee of the estate once the assignment has been received and approved by the Official Receiver.¹⁹ Therefore, the Canadian trustee effectively wears two hats, one

12. As late as 1972, the number of individual nonbusiness bankruptcies was only 3647. See ZIEGEL, CCRI, *supra* note 2.

13. Bankruptcy Act, R.S.C. 1949, c. 7.

14. OFFICE OF THE SUPERINTENDENT OF BANKR., AN OVERVIEW OF CANADIAN INSOLVENCY STATISTICS (2006) [hereinafter INSOLVENCY STATISTICS], available at <http://strategic.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/StatsBooklet2006-EN.pdf?FILE/StatsBooklet2006-EN.pdf>.

15. RICHARD ARCHAMBAULT, OFFICE OF THE SUPERINTENDENT OF BANKR., INSOLVENCY IN CANADA IN 2005, at 1 (2006), available at <http://strategic.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/InsolvencyinCanada2005.pdf?file/InsolvencyinCanada2005.pdf>.

16. INSOLVENCY STATISTICS, *supra* note 14, at 46.

17. OFFICE OF CONSUMER AFFAIRS, THE CONSUMER TRENDS REPORT 129–46 (2004), available at <http://consumer.ic.gc.ca/epic/internet/inoca-bc.nsf/en/ca02084e.html>.

18. Technically referred to in the BIA as an “assignment in bankruptcy.” See BIA, R.S.C. 1985, c. B-3, s. 2.

19. The term *Official Receiver* (OR) was borrowed from the British bankruptcy legislation and describes an official in the regional centres of the Office of the Superintendent of Bankruptcy (OSB)

hat in advising the debtor before bankruptcy and preparing the debtor's assignment in bankruptcy, and the other in administering the estate for the creditors' benefit after the assignment—a clear recipe for a conflict of interests, but nevertheless one so far acquiesced in by the federal government. Trustees advertise their services widely and make them readily available to all but the poorest segments of Canadian society by agreeing to act with a small down payment (and sometimes not even that) and payment of the rest of the fees and disbursements by installments.²⁰ Alternatively, the trustee's fees and disbursements may be covered, in whole or in part, by the income tax and goods and services tax (GST) refunds to which the debtor may be entitled after bankruptcy, and by the surplus income payments (discussed hereafter)²¹ required to be made by the debtor prior to the debtor's discharge from bankruptcy.

Though difficult to document accurately, a third factor, in my view, that explains the rapid increase of consumer insolvencies in Canada is a decline in the stigma attached to bankruptcy. Canadian debtors often express embarrassment about having to seek advice about their debt problems, but there are not many reported cases where chronically over-indebted consumers have rejected the bankruptcy solution as offensive to their self-esteem or moral code. In any event, a Canadian debtor anxious to avoid the bankruptcy stigma can always opt for a consumer proposal, Canada's counterpart to chapter 13 in the United States.²²

III. OPERATION OF DISCHARGE SYSTEM BEFORE 1997

There is little doubt that liberalization of the discharge system made personal bankruptcy much more attractive to Canadian consumers. As part of the 1949 revisionary Act, the debtor was deemed to have made an application for discharge at the end of the twelve-month period following the bankruptcy filing.²³ Creditors were notified of the application and it was left up to them to decide whether to oppose the discharge. In the great majority of cases, creditors did not oppose the discharge because the bankrupt's statement of income and expenditures made it clear that the debtor had no surplus income or that, even where there was a surplus, it was so small in relation to the debtor's total indebtedness that

entrusted with the powers and duties described in the BIA. See BIA, R.S.C. 1985, c. B-3, s. 12. Approval of a petition by the OR is usually only a formality to ensure that the simple regulatory requirements have been met. The OR has no power to refuse the assignment on policy grounds. Under section 181(1) of the BIA, the bankruptcy court has power to set aside an assignment if the court is of the view that the debtor was not insolvent or the assignment should not have been filed for other reasons. *Id.* s. 181(1).

20. The trustee's fees and recoverable disbursements are regulated under the BIA and, for a typical summary administration bankruptcy, currently amount to about Can\$1750. The actual amount varies slightly from province to province because of differences in the provincial sales tax.

21. See *infra* Part V.

22. In 2005, consumers filed 18,022 consumer proposals under Part III.2 of the BIA, amounting to 18% of the total number of consumer filings. ARCHAMBAULT, *supra* note 15, at 1.

23. Bankruptcy Act, R.S.C. 1949, c. 7, s. 7.

opposing the discharge was not worth the effort. In these cases, the court would sign the discharge order almost as a matter of course. The rapidly accumulating number of personal bankruptcy filings left them little choice.²⁴

A. 1992 Amendments

The 1992 Bankruptcy and Insolvency Act (BIA) amendments further facilitated early discharges in two ways. First, new section 168.1 of the BIA provided that first-time bankrupts were entitled to an automatic discharge nine months after the bankruptcy filing *unless* the trustee, the Superintendent of Bankruptcy, or the creditors objected.²⁵ This obviated the need for a court hearing where there were no objections.²⁶ Second, the 1992 amendments introduced the concept of consumer proposals,²⁷ Canada's counterpart to chapter 13 of the U.S. Bankruptcy Code, for those debtors with substantial assets or income, or both, who want to protect their nonexempt assets or avoid the stigma of bankruptcy.²⁸ Consumer proposals (CP) have proven popular, and in 2005, amounted to 18% of the total number of consumer insolvency filings.²⁹ The conceptual significance of the CP regime is that it helps to identify, by exclusion, the universe of debtors who are so heavily indebted or income poor that a bankruptcy assignment, coupled with an early discharge, is the best solution to their fiscal problems.³⁰

IV. MEANS TESTING UNDER THE BIA

A. Pre-1997 Period

I have already indicated—and this cannot be emphasized too strongly—that following the 1919 Bankruptcy Act, the trustee was always entitled to lay claim to the nonexempt part of the debtor's income prior to the debtor's discharge, regardless of the source of the income. Additionally, when the debtor applied for her discharge, the court had com-

24. See, e.g., *INSOLVENCY STATISTICS*, *supra* note 14, at 18–19 (showing the rise in filings between 1968 and 2004).

25. BIA, R.S.C. 1985, c. B-3, s. 168.1, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12; S.C. 2004, c. 24.

26. In such cases, the certificate of discharge is signed by the trustee. See BIA, R.S.C. 1985, c. B-3, s. 168(1)(f)(ii).

27. *Id.* s. 66.11, as am. by S.C. 1992, c. 27, s. 32; S.C. 1997, c. 12, s. 45.

28. Iain Ramsay, *Market Imperatives, Professional Discretion and the Role of the Intermediaries in Consumer Bankruptcy: A Comparative Study of the Canadian Trustee in Bankruptcy*, 74 *AM. BANKR. L.J.* 399, 433 (2000). A consumer was free to make a proposal to creditors under the pre-1992 regime but it was more complicated and more expensive, and secured creditors could not be included without consent. As a result, few insolvent consumers availed themselves of the option.

29. See ARCHAMBAULT, *supra* note 15.

30. Note, however, the high failure rate of consumer proposals in Canada. For the past three years the rate has been around 39%, which indicates that debtors have been making unrealistic commitments in their proposals or that they would have been better off opting for a straight bankruptcy in the first place. Cf. ZIEGEL, CCIR, *supra* note 2, at 46.

plete discretion to require the debtor to make payments by installments or as a lump sum as a condition of the debtor's discharge. Such conditional discharges were, and remain, quite common for upper-income earners seeking a discharge.

The statutory provisions were not well suited for wage earners with modest incomes and, until the Supreme Court of Canada's decision in *Industrial Acceptance Corp. v. Lalonde*,³¹ it was unclear whether the trustee's entitlement to claim the bankrupt's income under what is now section 67(1) of the BIA applied to wage earners. The Supreme Court of Canada held that it did.³² However, the decision did not address the question of the amount of the debtor's income the trustee was entitled to claim. That issue was not resolved until an amendment was made to the BIA in 1966 adding a new section 68. This provided that the trustee on his own motion or, if required by a creditor, at the creditor's request, could ask the bankruptcy judge to make an order requiring the bankrupt to pay a designated part of his wages to the trustee or, where appropriate, requiring the bankrupt's employer to make the payment. One weakness of section 68 was that it provided no formula for determining the attachable portion of the bankrupt's earnings. It also left the court to determine how much of the earnings the debtor needed to maintain himself and his family in reasonable comfort if the parties could not agree on the figure by themselves.³³

Section 68 was an awkward and expensive mechanism that was not much used in practice.³⁴ Instead, the Superintendent of Bankruptcy sought to address the matter (though this did not happen until 1979) by issuing a "statement"³⁵ providing trustees with guidelines for determining what part of their earnings bankrupts should be obliged to hand over before the question even reached the court. The guidelines were predicated on the trustee's determining the bankrupt's net monthly income, ascertaining the bankrupt's marital status and number of dependents, and then consulting a grid table to determine how much the bankrupt needed to cover his and his family's basic living expenses.³⁶ The trustee was expected to require payment of one-half of the difference between the net income and the cost of living allowance where the surplus income

31. [1952] 2 S.C.R. 109.

32. *Id.*

33. BIA, R.S.C. 1985, c. B-3, s. 68, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12.

34. Information based on author's discussions with insolvency practitioners and OSB officials.

35. It was a "statement" and not a "directive" because the Superintendent did not acquire the power to issue directives until the 1992 amendments to the BIA. The author is indebted to Dave Stewart, a senior OSB Ottawa official, for this explanation. Stewart also told the author that the long delay in the OSB issuing the statement was due to the fact that until 1984 the federal officials were still expecting the Canadian Parliament to adopt a revised Bankruptcy Act that would address the problem directly.

36. OFFICE OF THE SUPERINTENDENT OF BANKR., DIRECTIVE NO. 11R "SURPLUS INCOME" (2006) [hereinafter DIRECTIVE 11R], available at [http://strategis.ic.gc.ca/epic/internet/inbsf-obs.nsf/vwapj/Dir11R2006.pdf/\\$file/Dir11R2006.pdf](http://strategis.ic.gc.ca/epic/internet/inbsf-obs.nsf/vwapj/Dir11R2006.pdf/$file/Dir11R2006.pdf).

was below \$1000 a month, and at least half, but no more than 75% of that amount where it was over \$1000.³⁷ The cost of living allowance was based on a poverty standard originally formulated in a report of the Senate of Canada.³⁸

The guidelines were ambiguous in two important respects. First, they did not *oblige* trustees to apply the guidelines strictly and, second, the guidelines did not spell out what deductions were permissible in determining the bankrupt's net income. As a result, trustees applied the guidelines very flexibly in practice and generally found that the debtor had no surplus income that he was required to surrender to the trustee.³⁹

B. *Post-1997 Period and Revised Section 68*

Not surprisingly, creditors were unhappy with this outcome and, largely at their behest, section 68 was drastically revised as part of the 1997 amendments to the BIA to ensure compliance with the surplus income payment requirements. In addition, the Superintendent of Bankruptcy issued a new directive, Directive 11R, to supplement the skeletal statutory provisions.⁴⁰ Today, it is these two sources that determine the surplus income payable by individual bankrupts to their trustees and that require trustees to make reasonable efforts to ensure compliance.

Revised section 68 is a long section with fourteen subsections.⁴¹ Its essential features can be boiled down to the following propositions:

1. The Superintendent is to determine by directives the standards for determining the portion of total income of an individual bankrupt exceeding the amount necessary to enable the bankrupt to maintain "a reasonable standard of living" (subs. 1). "Total income" is defined as including all revenue of a bankrupt of whatever nature or from whatever source.
2. The trustee is responsible for fixing the amount the bankrupt is required to pay the estate, having regard to the standards established by the directive and the "personal and family situation" of the bankrupt (subs. 3(a)).

37. *Id.*

38. STATISTICS CAN., *LOW INCOME CUTOFFS FROM 1991 TO 2000 AND LOW INCOME MEASURES FROM 1990 TO 1999*, at 42-43 (2001), available at <http://www.statcan.ca/english/research/750002MIE2001007.pdf>.

39. The author can attest to this result from a random number of pre-1967 Form 65 income and expenditure statements he had occasion to examine in Ottawa several years ago. It became clear to him that trustees were placed in an awkward position and, for competitive reasons, could not afford to strictly apply the guidelines knowing that, if they did, debtors seeking bankruptcy relief would retain the services of other trustees who took a more lenient approach. Form 65 is reproduced in appendix 3 and is available at [http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/Form65_July2006_E.pdf/\\$FILE/Form65_July2006_E.pdf](http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/Form65_July2006_E.pdf/$FILE/Form65_July2006_E.pdf).

40. DIRECTIVE 11R, *supra* note 36.

41. BIA, R.S.C. 1985, c. B-3, s. 68, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12. Section 68 is reproduced in appendix 1.

3. The trustee must take reasonable measures to ensure the bankrupt's compliance with the payment requirements (subs. 3(c)).
4. The trustee may at any time modify the amount payable by the bankrupt in the light of material changes in the personal or family situation of the bankrupt or a recommendation made by the official receiver (subs. 4).
5. The official receiver plays a supervisory role and may "recommend" to the trustee and the debtor a change in the amount of the surplus income to be paid by the debtor if he is of the view that the amount fixed by the trustee does not meet the applicable standard.
6. Where the trustee, the bankrupt, or a creditor disagree about the amount required to be paid by the bankrupt, any of them can request mediation of the dispute. The dispute procedure is to be determined by regulation.
7. Recourse may be had to the bankruptcy court in the following cases:
 - (a) where the trustee has failed to implement a recommendation of the official receiver;
 - (b) where mediation of an issue has proven unsuccessful; and
 - (c) where the bankrupt has failed to make the required payments (subs. 10).
8. The bankruptcy court also plays the following additional roles:
 - (a) In determining what is fair and reasonable remuneration for the bankrupt's services where the bankrupt is related to the employer;
 - (b) To issue an order to a person obliged to make payments to the estate where the person has failed to comply, and requiring the obligor to make the payments to the trustee (subs. 13(b)).

C. Directive 11R⁴²

As noted above, section 68 requires the bankrupt's surplus income to be determined in accordance with standards established by directive. Directive 11R was issued on October 3, 2000, and is updated annually to reflect changes in the Low Income Cut Off standards (LICO) established

42. See appendix 2 for the verbatim terms of the Directive issued October 3, 2000, and updated most recently on January 23, 2006.

by Statistics Canada.⁴³ The procedure set forth in the directive for determining the bankrupt's surplus income is as follows:

First, the trustee must establish the debtor's personal and family situation and the size of the family unit. "Family Unit" includes any person residing in the same household as the bankrupt and who benefits from expenses incurred or income earned by the bankrupt or who contributes to such expenses or earnings, and also includes persons who, though not residing in same household, benefit from the bankrupt's earnings or expenses.⁴⁴

Second, the trustee must compute the family unit's total net monthly income.⁴⁵ Two sets of deductions are recognized for the purpose of determining the net income:

(1) for a salaried employee, these cover minimum required statutory remittances (e.g., income taxes and pension and employment insurance deductions) and other mandatory deductions actually paid by the bankrupt. In the case of a self-employed member of the family unit, the deductions cover business expenditures and deductions permitted under the Canadian federal Income Tax Act and corresponding provincial legislation; and

(2) in all cases, *nondiscretionary expenses* applicable to the bankrupt and other members of the family unit, viz. (a) child support payments; (b) spousal support payments; (c) child care expenses; (d) expenses associated with a medical condition; (e) court-imposed fines or penalties in course of being paid off; (f) expenses permitted under the Income Tax Act and similar provincial legislation for expenses of employment; and (g) other debts enforceable against the bankrupt where the BIA stay of proceedings has been lifted by the court.

Third, the trustee determines the bankrupt's total monthly surplus income by subtracting from the family unit's net monthly income the amount that, applying the LICO standards, corresponds to the number of persons in the family unit.⁴⁶ Where the monthly surplus income is more than \$100 and less than \$1000, the bankrupt is obliged to pay the trustee

43. LICOs are set according to the proportion of annual family income spent on food, shelter and clothing. A Canadian family with average income currently spends 44% of its after-tax income on food, clothing, shelter, and other basic necessities. A low-income family is deemed one that spends 64% of its income this way. See STATISTICS CAN., *supra* note 38, at 13. Statistics Canada insists that LICO does not measure poverty in Canada because there is no objective way to measure poverty, nationally or internationally. *Id.* at 51. In addition to the LICO tables, Statscan also publishes "Low Income Measures" tables identifying Canadian family units whose income is 50% of the median Canadian family unit income. *Id.* Another low-income benchmark, "market-basket measure," that is related to families unable to afford a shopping basket of basic life necessities, has been considered for adoption by the Canadian government. See Margaret Philp, *New Poverty Gauge Based on Survival*, THE GLOBE & MAIL, Jan. 9 2003, at A3.

44. DIRECTIVE 11R, *supra* note 36, s. 4.

45. If a family member refuses to disclose his income, the member is excluded from the calculations for the purpose of determining the bankrupt's surplus income. See *id.* s. 10.

46. Directive 11R, as updated January 23, 2006, appears in appendix 2.

one-half of that amount.⁴⁷ Where the monthly surplus income is \$1000 or more, the bankrupt must pay at least 50%, but the trustee may increase the proportion up to 75% of the amount over \$1000.⁴⁸

Fourth, a “family situation adjustment” must be made to the figure derived in the third step. The amount the bankrupt is required to pay to the estate is adjusted to the same percentage as the bankrupt’s portion of the family unit’s total available income.⁴⁹

Hypothetical Example. Directive 11R offers the following example of how the calculations prescribed in the Directive may apply to a family unit of two:

Bankrupt’s available monthly income:	\$1800
Other family unit member’s available monthly income:	\$1000
Family unit’s available monthly income:	\$2800
Minus the Superintendent’s standard for a family unit of 2 as per Appendix A:	\$2194
Total monthly surplus income	\$606
Bankrupt’s portion of the family unit’s monthly income [$1800 \div 2800 = 64.3\%$]	
Payment required from bankrupt, as per paragraph 7(2)(a) of the Directive [($606 \times 64.3\%$) \times 50% = 194.82]	\$195

V. CANADIAN OPERATIONAL EXPERIENCE: 2005

Revised section 68 and Directive 11R became effective in the spring of 1998. Since then, the Office of the Superintendent of Bankruptcy (OSB) has been collecting data on surplus income (SI) payments required to be made and actually made. Data covering the period August 1, 1998 to December 2001 appear in the author’s book, *Comparative Consumer Insolvency Regimes: A Canadian Perspective*.⁵⁰ Tables 1 and 2, below, contain data for the year 2005. Table 1 relates to surplus income filings by province made by trustees; table 2 shows, inter alia, bankrupts’ actual payment performance.⁵¹

47. See DIRECTIVE 11R, *supra* note 36, s. 7(2)(a).

48. *Id.* s. 7(2)(b).

49. *Id.* at s. 8.

50. ZIEGEL, CCIR, *supra* note 2, at 31–36.

51. Corresponding figures for the earlier period, where helpful, are shown in parentheses in the text.

TABLE 1⁵²
 SURPLUS INCOME FILINGS FOR INDIVIDUAL CONSUMERS IN 2005
 ESTATES WITH SI REQUIRED AND AN AMOUNT > 0 IN AGREED TO PAY

Province	Number of Estates per Province by SI Amount Paid Monthly											Total
	< \$100	\$100 to \$199	\$200 to \$299	\$300 to \$399	\$400 to \$499	\$500 to \$599	\$600 to \$699	\$700 to \$799	\$800 to \$899	\$900 to \$999	> \$1000	
NF	23	194	51	29	15	5	11	3	1	2	0	334
NS	21	312	130	63	34	22	10	5	4	2	7	610
PEI	2	20	5	2	1	0	0	1	0	0	0	31
NB	12	264	62	24	9	9	3	0	2	0	4	389
PQ	181	1793	747	332	191	115	58	20	23	12	25	3497
ON	373	3500	1857	926	509	246	161	94	52	37	63	7818
MB	21	240	85	39	21	11	5	3	2	2	2	431
SK	27	93	95	23	14	11	3	2	0	1	1	270
AB	112	823	845	297	181	114	62	31	22	17	29	2533
BC	168	979	501	246	122	67	40	23	13	9	33	2201
NWT	0	3	4	6	1	0	0	0	1	0	1	16
YK	1	2	0	2	1	0	1	0	0	0	1	8
Total	941	8223	4382	1989	1099	600	354	182	120	82	166	18,138

TABLE 2
 2005 OVERALL CONSUMER BANKRUPTCY FILINGS

Province	Frequency	Percent	Cumulative Frequency	Cumulative Percent
NF	2329	2.75	2329	2.75
NS	3758	4.44	6087	7.2
PEI	253	0.3	6340	7.49
NB	2541	3	8881	10.5
PQ	23,196	27.42	32,077	37.92
ON	30,827	36.44	62,904	74.36
MB	2340	2.77	65,244	77.13
SK	2186	2.58	67,430	79.71
AB	8703	10.29	76,133	90.00
BC	8398	9.93	84,531	99.93
NWT	34	0.04	84,565	99.97
YK	23	0.03	84,588	100
NU	2	0	84,590	100

2005 MEAN AND MEDIAN (MONTHLY) SI PAYMENTS

Mean	\$255.13
Median	\$197.20

52. Office of the Superintendent of Bankruptcy, March 2006.

TABLE 3⁵³

ALL 2005 INDIVIDUAL BANKRUPTCY ESTATES REQUIRED TO PAY SI

Variable	N	Mean	Median
Required Monthly SI Amount	20,893	\$246.40	\$181.80
Agreed To Pay Monthly SI Amount	20,868	\$270.34	\$200.00

TABLE 4

2005 REQUIRED TO PAY SI, CONSUMER ONLY

Variable	N	Mean	Median
Required Monthly SI Amount	19,328	\$242.81	\$180.00
Agreed To Pay Monthly SI Amount	19,306	\$266.94	\$200.00

TABLE 5

ALL 2005 INDIVIDUAL BANKRUPTCY ESTATES COMPLIANCE WITH SI REQUIREMENT

SI Payments	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Less	1328	6.36	1328	6.36
More	9261	44.33	10,589	50.68
Same	10,304	49.32	20,893	100

TABLE 6

COMPLIANCE WITH SI REQUIREMENT, CONSUMER ONLY

SI Payments	Frequency	Percent	Cumulative Frequency	Cumulative Percent
Less	1211	6.27	1211	6.27
More	8619	44.59	9830	50.86
Same	9498	49.14	19,328	100

TABLE 7

ALL 2005 INDIVIDUAL BANKRUPTCY ESTATES, AMOUNT PAID OVER SI REQUIREMENT

Number of Estates	Mean	Median
9260	\$75.94	\$62.00

53. OSB-generated data for use by author, March 17, 2006.

TABLE 8
AMOUNT PAID OVER SI REQUIREMENT, CONSUMER ONLY

Number of Estates	Mean	Median
8618	\$75.60	\$61.39

Some of the salient features of the data in these tables are as follows. Out of 84,590 bankruptcy filings made in 2005 (*1998–2001*: 257,116), 18,138 bankrupts or 21% (19.06%) were required to make monthly surplus income payments. The mean required payment was \$255.13 and the median amount was \$197.20. So far as the size of the monthly payment is concerned, 45% fell in the \$100–\$199 bracket (*1998–2001*: 49.8%), 24% in the \$200–299 bracket (*1998–2001*: 21.8%) and 10% in the \$300–399 bracket (*1998–2001*: 10%). These three brackets accounted for 79% of surplus income payments required from the 2005 consumer bankruptcy filers. The 2005 SI figures show a modest increase on the 1998–2001 data. In the view of a senior OSB official, the increase may be due to substantial improvements in the Canadian economy over the past two years and the low rate of unemployment by Canadian standards.⁵⁴

So far as the actual payment performance is concerned, table 6 shows that 6.27% of the debtors paid *less* than the required amount (9.29%); 44.59% paid *more*, and 49.14% paid the *exact* amount (90.71% for both categories).⁵⁵ The mean payment exceeding the required amount was \$75.60. The median amount of all SI payments exceeding the required amount was \$61.39.

These statistics require further explanation. First, the fact that 6.27% of the 2005 debtors failed to make the required payments does not mean that they refused to do so. The section 170 reports required to be filed by trustees at the time of the bankrupt's discharge application show that in many cases the shortfall was due to the seasonal character of the bankrupt's employment, a medical condition, or loss of the benefit of a spousal income.⁵⁶ Another important factor (also recorded in the trustees' reports) is the bankrupt's position that the applicable LICO standard is too low to cover the bankrupt's monthly expenses and that the bankrupt has expressed her willingness to pay a lower amount of surplus income over a period longer than the standard nine months.⁵⁷ The parties are entitled to seek mediation to resolve their differences over re-

54. ARCHAMBAULT, *supra* note 15.

55. *See* table 6 *supra*.

56. Information based on data supplied by Andrew Alexander. *See infra* note 58.

57. Note, however, that under Directive 6R, s. 8, issued on April 30, 1998, the trustee must complete an assessment before the bankruptcy assignment takes place. OFFICE OF THE SUPERINTENDENT OF BANKR., DIRECTIVE NO. 6R "ASSESSMENT OF AN INDIVIDUAL DEBTOR," s. 8 (1998), available at <http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/en/br01096e.html>. As part of the assessment, the trustee must advise the debtor of the various options open to the debtor to address the debtor's financial problems. *Id.* s. 9; *see also* ZIEGEL, CCIR, *supra* note 2.

quired SI payments, but rarely do.⁵⁸ Trustees usually acquiesce in the debtor's wish to pay a lower amount of SI over a longer period. There is a question (which I discuss below) whether Directive 11R permits this accommodation; but the accommodation happens anyway.⁵⁹

A second factor requiring explanation is why so many debtors pay more than the required amount. The answer is that they do it to ensure that by the end of the nine months, the trustee will have received the approximately \$1800 he is entitled to claim as his fees and disbursements for administering the bankruptcy. Again, there is a significant doubt whether this arrangement is consistent with the BIA provisions as expounded in the Manitoba Court of Appeal's decision in *Berthelette (Re)*,⁶⁰ but it has won the implicit approval of the OSB. What this shows is that in a high percentage of the cases—certainly more than 50%—the debtor's SI payments are being used to cover the trustee's fees and disbursements. It is fair to infer that this arrangement admirably suits both parties' purposes: the debtor can fairly claim that he has met the section 68 payment requirements while also satisfying the trustee's entitlements, and trustees can report to the OSB and the debtor's creditors that the debtor has met his section 68 SI payment requirements and is entitled to an unconditional discharge.

The conclusion drawn in the last paragraph can be illustrated in another way. Data collected by the OSB in a 2001 *Study of Receipts and Disbursements: Sample of 900 Summary Administration Estates* showed that median receipts from all sources amounted to Can\$1795.13 and that 64.9% of the disbursements went to pay trustees' fees. Only 3.6% of the total receipts of the estates, or an average of \$103.13, was derived from SI payments.⁶¹ Dividends paid to creditors amounted to 17.3% of the disbursements or Can\$310.56 per file of median receipts of \$1795.13.⁶²

Given the trivial benefits derived by Canadian creditors from the SI payment requirements, one may wonder why they appear to be so satisfied with it. At any rate they have not pressed for any basic changes in the current regulatory structure.⁶³ I believe the answer is that creditors attach more importance to the symbolic value of section 68 than to the tangible benefits they derive directly from the section. Creditors see SI

58. The total number of BIA consumer bankruptcy mediations held in Ontario during 1998–2006 amounted to only 341 and was substantially less than 1% of the number of Ontario consumer bankruptcies for the period. This information was collected, and kindly supplied to the author, by Andrew Alexander of the Toronto OSB District Office.

59. Our American friends would describe this as an excellent example of local culture at work.

60. [1999] 174 D.L.R. (4th) 577; see also ZIEGEL, CCIR, *supra* note 2, at 20 (discussing the *Berthelette (Re)* decision).

61. ZIEGEL, CCIR, *supra* note 2, at 35 n.99.

62. *Id.*

63. Indeed, none appear in Bill C-55. As previously noted, Bill C-55 contains a significant change in section 170.1, calling for an extension of the nine-month payment period to twenty-one months where the bankrupt shows surplus income in the first nine months. However, this change was inspired by the trustees and did not come from creditors.

payment requirements as sending an important message to insolvent debtors that they cannot simply walk away from their obligations once they have filed for bankruptcy, and as reaffirming Canada's longstanding rejection of the U.S. fresh start philosophy.

VI. ISSUES ARISING OUT OF THE CANADIAN MEANS TESTING REGIME

The preceding Part is not meant to suggest that the Canadian means testing regime is trouble free; in fact, it contains many flaws of varying types. In this Part, I examine some of the obvious questions that will occur to the American reader.

A. *Rationale for Limiting the SI Period to Nine Months*

The short answer for why the SI Period is limited to nine months is that there is no logical reason; the nine-month period is an historical accident. The Colter Committee recommended in 1986 that first time bankrupts should be entitled to an automatic discharge after nine months unless there was an objection.⁶⁴ The recommendation was adopted in the 1992 amendments to the BIA.⁶⁵ The drafters of the 1997 revision of section 68 probably appreciated that in the case of low-income consumers (by far the great majority of all bankruptcy filers), any SI payments would be a token amount and that it was unrealistic, and perhaps oppressive, to expect the debtors to maintain the payments for a longer period. The drafters were also clearly of the view that nine months would be too short for debtors with a generous income. Thus, section 170.1⁶⁶ provides that the trustee, in his report on the bankrupt's conduct, can oppose the discharge on the ground that the debtor could have made a viable consumer proposal or that other conditions should be attached to the debtor's discharge.⁶⁷

B. *Why Was the LICO Standard Adopted to Determine the Cost of Living Exemption?*

So far as I am aware, there has never been a serious debate in Canada about how the basic cost of living exemption should be determined for section 68 purposes. The adoption of the LICO standard appears to

64. MARGARET SMITH, PARLIMANTARY RESEARCH BRANCH OF THE LIBRARY OF PARLIAMENT, BANKRUPTCY LAW UPDATE 13 (1999).

65. BIA, R.S.C. 1985, c. B-3, s. 168.1(1)(f), as am. by S.C. 1992, c. 27; S.C. 1997, c. 12; S.C. 2004, c. 24.

66. *Id.* s. 170.1.

67. *See id.* At the behest of the Personal Insolvency Task Force report, FINAL REPORT, *supra* note 1, Bill C-55 contains an important amendment extending the basic nine-month SI payment requirement by another twelve months where the debtor had made SI payments in the first nine months. The author strongly opposed the amendment when it was discussed in the Task Force and again when it was introduced (albeit in stronger form) in Bill C-55.

have come about for the following reasons. Apparently there is no agreement among the experts about how to measure poverty and skepticism concerning whether one can objectively identify poverty.⁶⁸ Statistics Canada developed LICO in the early 1990s as a proxy for the elusive poverty standard.⁶⁹ LICO represents a Canadian resident's income, approximately 60% or more of which is spent on food, shelter, transportation, and other items regarded as necessary for a moderate life style.⁷⁰ It does *not* reflect a middle class lifestyle and does not include such middle class "luxuries" as transportation by private vehicle or an annual vacation outside Canada.

Obviously, the OSB appreciated that limiting the bankrupt to a cost of living allowance based on LICO would be draconian. As a compromise, the debtor is allowed to retain, in addition to the LICO amount, half of the net income after making the Directive 11R calculations.⁷¹ It is arguable that better options were available and that the federal government should have appointed an expert committee to make recommendations. My conjecture is that this did not happen for two reasons. First, there was no consumers' lobby to press for it—low-income debtors are no more empowered in Canada than they are in the United States. Second, most debtors required to make SI payments under the LICO standards were probably willing to tighten their belts so long as it was only for nine months and provided they could be assured of a fresh start at the end of that period.

Although the cost of living varies significantly among the provinces and among urban centres in Canada, the LICO standard appearing in the annual 11R table applies across Canada.⁷² The OSB considered producing a series of LICO standards to take account of these differences but decided it would lead to too many complications. The LICO standard appearing in the 11R table is based on the standard appropriate for an urban centre that has a population of over 500,000.⁷³

C. *Inadequacies of Permissible Deductions*

As noted earlier, Directive 11R permits two types of deductions in calculating the debtor's net income: (a) expenses and deductions related to the debtor's employment or his status as a self-employed person, and (b) payments required to be made by the debtor to discharge designated obligations.⁷⁴ Missing from the first list is any recognition that the debtor should be entitled to claim employment expenses such as the acquisition

68. Daniel Altman, *Does a Dollar a Day Keep Poverty Away?*, N.Y. TIMES, Apr. 26, 2003, at B7.

69. STATISTICS CAN., *supra* note 38, at 7–9.

70. *See id.* at 7.

71. *See* DIRECTIVE 11R, *supra* note 36, at 2.

72. *Id.* at 7.

73. *Id.*

74. *Id.* at 2.

and operation of a motor vehicle or an allowance for clothing necessary in the debtor's employment.

The list of permissible deductions for personal obligations will surely strike many readers as whimsical. The debtor is permitted to deduct penalties and fines that they have paid. Thus, presumably the debtor can deduct parking fines and fines for other motoring offenses even though the 11R Directive makes no allowance for the cost of operating the vehicle that gave rise to the penalty!⁷⁵ Similarly, the Directive allows no deductions for mortgage payments on the debtor's home or for expenses necessary to keep owner-occupied premises in a state of reasonable repair.⁷⁶ This is true even though retention of the debtor's existing living accommodation would be better, psychically and logistically, for the debtor and his family than forcing the debtor to liquidate the equity in the home and move into rental premises.

D. Scope for Additional Deductions at Trustee's Discretion?

The scope of a trustee's discretion in allowing additional deductions is an important question that requires an answer given the rigidity of the enumerated deductions in the Directive. Canadian opinion on the question appears to be divided.⁷⁷ Canadian trustees generally take the position that Directive 11R leaves them no leeway, but there are exceptions. The section 170 reports filed by trustees show that some trustees will read a permissible relaxation into the rules if they are convinced that the circumstances justify it.⁷⁸ At least one senior OSB official takes the position that Directive 11R permits trustees to exercise a general discretion.⁷⁹ The official bases this conclusion on the ground that the Directive enjoins the trustee to determine the bankrupt's surplus income "having regard . . . to the personal and family situation of the bankrupt."⁸⁰ He also points to the fact that trustees often agree or acquiesce in the debtor's making smaller payments than those required in the 11R table, so long as

75. See *id.* at 3 (listing permissible deductions).

76. See *id.*

77. Compare Jacob Ziegel, *Facts on the Ground and Reconciliation of Divergent Consumer Insolvency Philosophies*, 7 THEORETICAL INQUIRES L. 299, 321 (2006) (discussing the uniform standard of cost of living allowances and the corresponding limitation on trustee discretion), with FINAL REPORT, *supra* note 1 (suggesting that trustees maintain limited discretion in some cases).

78. A good example is the trustee who determined that the LICO standard did not take into account the high cost of living in the Yukon Territory where the debtor worked, and therefore agreed with the debtor that the LICO standard should be adjusted in accordance with the Northern Residence Reduction as allowed by the Canadian Income Tax Act, R.S.C. 1985, c. 1. See Form 82 Reports by Trustees, Comments by Trustees re: Non-Payment of Prescribed Surplus Income Amounts, Estate No. 66. The table was kindly supplied to the author by Sheila Robin, Senior Analyst, Office of the Superintendent of Bankruptcy, Ottawa. Form 82 is reproduced in appendix 5 and available at [http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/Form82_July2006_E.pdf/\\$FILE/Form82_July2006_E.pdf](http://strategis.ic.gc.ca/epic/internet/inbsf-osb.nsf/vwapj/Form82_July2006_E.pdf/$FILE/Form82_July2006_E.pdf).

79. Opinion expressed to author by Dave Stewart, a senior and very experienced OSB official.

80. DIRECTIVE 11R, *supra* note 36, s. 3(a).

the payments due and accruing in the nine-month period are made during the extended period of payment (usually twenty-one months).

I believe the official is mistaken in his position. As a matter of statutory construction, it seems clear that “having regard . . . to the personal and family situation of the bankrupt” refers to the size of the bankrupt’s family unit and its impact on the calculation of the LICO standard and the family’s net income. Reading the words as conferring a general discretion on the trustee to determine the amount of surplus income would drive a coach and four horses through the 11R structure and reinstate the loose pre-1997 practices that section 68 was designed to avoid.⁸¹ Whether trustees are in breach of Directive 11R in allowing bankrupts to extend payments over a longer period than nine months is debatable. Trustees may respond that they cannot force debtors to make the required payments on time, that it would be counterproductive to attempt to do so, and that to acquiesce in the longer period of repayment is consistent with trustees’ explicit power to recommend a conditional discharge where the debtor has not met the prescribed payments during the nine-month period and that the debtor should be given a longer period to meet the debtor’s obligations.⁸²

E. Conclusion

What this discussion of the problematic features of section 68 and Directive 11R shows is that the Canadian surplus income payment system is ripe for review. However, this view is not widely shared in Canada. It seems that the actual players in this drama—the trustees, the OSB, and creditors—prefer to live with the ambiguities of the existing regime than to open a Pandora’s box of problems and run the risk that the interested parties may not be able to agree on a revised version of Directive 11R, or that the revised version may create more problems of interpretation and application than does the existing version.⁸³

VII. WHAT CAN THE UNITED STATES LEARN FROM THE CANADIAN EXPERIENCE?

I said at the beginning of this paper that I did not think the United States could learn anything from the Canadian system unless the United

81. See, e.g., *Pottie (Re)*, No. 23229, 11 A.C.W.S. (3d) (N.S.S.C. Jan. 29, 2002) (Can.), available at 2002 A.C.W.S. LEXIS 391. In a one-page judgment, Registrar Hill expressed the view that he was not bound by the Superintendent’s surplus income directive. *Id.* However, he gave no reasons and I believe he was mistaken for the reasons stated in the text.

82. See BIA, R.S.C. 1985, c. B-3, s. 170.1, as am. by S.C. 1997, c. 12.

83. See Karen Gross, *Demonizing Debtors: A Response to the Honsberger-Ziegel Debate*, 37 OSGOODE HALL L.J. 263, 264–65 (1999) (discussing the ambiguous use of the term *fresh start* by parties involved in the bankruptcy debate, and establishing several points of contention concerning the 1997 amendments to Canada’s bankruptcy laws).

States was willing to rethink its whole approach to means testing and the fresh start policy. I will now explain my position and attempt to justify it.

The first—and conceptually most important—reason is that means testing serves very different purposes in the two regimes. Under BAPCPA, the purpose of the means test is to deny debtors relief under chapter 7 if they fail the means test.⁸⁴ Not only that, but the debtors are stigmatized as seeking to abuse the bankruptcy system if they fail the test; hence the heavy paraphernalia of safeguards—mandatory prefiling credit counseling, a judicial hearing if the debtor fails the means test, and penalties for attorneys who fail to exercise due diligence to ensure that debtors fully and accurately disclose their financial circumstances—to deter such abuses.⁸⁵

The Canadian approach is very different. The object of means testing under section 68 and Directive 11R is not to deny debtors the option of using the straight bankruptcy route under the BIA.⁸⁶ Rather, it is to ensure that surplus income received by the bankrupt during the bankruptcy period and prior to discharge is made available to the estate.⁸⁷ As explained earlier, this feature was implicit in Canada's insolvency system from the beginning.⁸⁸ The purpose of the 1997 amendments was not to change the conceptual approach but to ensure that the spirit of the legislation was observed in practice.⁸⁹

The effect of BAPCPA's means testing provisions is to draw a sharp divide between the function of chapter 7 and chapter 13, and to reserve chapter 7 for those debtors who lack meaningful surplus income as measured by the newly adopted standards.⁹⁰ I believe the greater flexibility of the Canadian approach has much to commend it. It allows debtors with a modest surplus income to make payments for a short period (nine months in most cases) and earn their discharge without forcing them into making an unrealistic consumer proposal with high prospects of failure.⁹¹ The much shorter payment period under section 168.1 of the BIA also gives Canadian bankrupts the psychological satisfaction of being able to claim that they have "earned" their discharge.⁹²

84. Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA) of 2005, Pub. L. No. 109-8, § 707(b), 119 Stat. 23, 126 (codified at 11 U.S.C. § 707).

85. *Id.* § 106(a), 119 Stat. at 37–38 (codified at 11 U.S.C. § 109 (h)) (credit counseling); *id.* § 102(a), 119 Stat. at 27–32 (codified at 11 U.S.C. § 707) (judicial review); *id.* 119 Stat. at 30 (codified at 11 U.S.C. § 707(b)(4)) (attorney penalties).

86. See Jacob S. Ziegel, *The Philosophy and Design of Contemporary Consumer Bankruptcy Systems: A Canada-United States Comparison*, 37 OSGOODE HALL L.J. 205, 249 (1999).

87. *Id.* at 250.

88. *Id.* at 223.

89. *Id.* at 228.

90. See BAPCPA § 102, 119 Stat. at 27–35 (codified at 11 U.S.C. § 707); see also Charles J. Tabb, *Consumer Bankruptcy After the Fall: United States Law Under S.256 11–13* (Law and Econ. Working Paper Series, Working Paper No. LE05-031, 2005), available at <http://ssrn.com/abstract=859645>.

91. Jacob S. Ziegel, *Introduction to the Symposium on Consumer Bankruptcies*, 37 OSGOODE HALL L.J. 1, 8 (1999).

92. BIA, R.S.C. 1985, c. 3, s. 168.1, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12; S.C. 2004, c. 24.

The unusual role played by Canadian trustees in the administration of the surplus income system also deserves emphasis. It is in the trustees' interest to ensure that debtors make full disclosure of their incomes and make the required payments on time because, as we have seen,⁹³ trustees rely heavily on the payments to cover their fees and disbursements. As also noted, the trustees have been very successful in persuading the bankrupts to pay more than is required under Directive 11R. At the same time, trustees cannot afford to risk losing debtors' goodwill by recommending an extension of the nine-month payment period in their section 170.1 reports without the debtors' consent, or by the trustees complaining that the debtor should have made a proposal, because such hostile conduct will drive away business. American observers may well feel that the anomalous position of Canadian trustees and their dual loyalties has little to commend it, yet it is generally accepted in Canada as saving insolvent debtors the cost of hiring an attorney to file the debtors' assignments in bankruptcy.⁹⁴

So far as the actual calculation of the debtor's net disposable income is concerned, the BAPCPA provisions appear to be significantly more favorable to debtors than is true of the Canadian calculations under Directive 11R.⁹⁵ The Canadian LICO standards are based on the consumption and expenditure patterns of low-income Canadians. Similarly, the permissible deductions in calculating the bankrupt's surplus income are narrowly drawn and reflect a belt-tightening philosophy with Victorian-era roots.⁹⁶ Noticeably, Directive 11R allows no deductions for mortgage payments on the debtor's residence, no deductions for the acquisition or operation of a motor vehicle, and none for charitable donations or to pay for the private schooling of the debtor's children.⁹⁷ The one important concession made in Directive 11R is that the debtor is allowed to retain one-half of the net disposable income to use as the debtor sees fit.⁹⁸ However, in most cases, this concession does not appear to be sufficient to offset the absence of permissible deductions for mort-

93. See *supra* text accompanying notes 59–62.

94. See Jean Braucher, *Option in Consumer Bankruptcy: An American Perspective*, 37 OSGOODE HALL L.J. 155, 168–69 (1999).

95. Compare DIRECTIVE 11R, *supra* note 36, at 4–8, with BAPCPA § 102(h), 119 Stat. at 33 (codified at 11 U.S.C. § 1325(b)). This probably explains why, according to a recent report by the National Association of Consumer Bankruptcy Attorneys, based on an analysis of section 61, 335 debtors (or 97%) who had consulted credit counseling agencies as the required first step before filing for bankruptcy under BAPCPA were unable to repay any debt. American College of Bankruptcy, LEGISLATIVE UPDATE, Feb. 23, 2006. Conversely, the lower average incomes and smaller number of deductions permitted under Directive 11R presumably explain why, in 2005, 21% of Canadian filers were required to make surplus income payments. See *supra* Part V.

96. DIRECTIVE 11R, *supra* note 36.

97. *Id.*

98. *Id.* at 5.

gage payments and the cost of operating a vehicle. The Canadian debtor has to resort to other means to enable him to cover these expenditures.⁹⁹

TABLE 9
COMPARISON OF CANADIAN AND U.S. MEANS TESTING PROVISIONS*

	Canada	U.S.
A. <i>Preconditions to Filing</i>	No	Yes
1. Prefiling counseling	No	Yes
2. D must have median or plus income of residents of her state	No	Yes
B. <i>Consequence of D failing Means Test/ Showing Surplus Income (SI)</i>	D must make SI payments for minim. 9 mths	D denied ch. 7 access
C. <i>Ingredients of SI/Mean Test</i>		
1. Cost of living allowance	LICO national standard	IRS national and local standards
2. Other deductions:		
(a) Alimony/child support Payments	Yes	Yes
(b) Medical Expenses	Yes	Yes
(c) Mortgage & other secured obligations	No	Yes
(d) Cost of acquisition & maintenance of motor vehicle	No	Yes
(e) Private schooling	No	Yes
(f) Charitable donations	No	Semble, Yes
(g) Fine & penalties	Yes	?
(h) Postbankruptcy enforceable Obligations	Yes	?
D. <i>Sanctions against attorneys for false filings</i>	No	Yes

*Comparison based on section 707(b)(2) of BAPCPA, section 68 of the BIA, and OSB Directive 11R.¹⁰⁰

99. Typically, it seems, by reducing the required monthly surplus income payments and extending them over twenty-one months instead of the nine-month period envisaged in section 168.1 and Directive 11R.

100. BABCPA § 102, 119 Stat. 23, 27-35 (codified at 11 U.S.C. § 707(b)(2)); BIA, R.S.C. 1985, c. B-3, s. 68, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12; DIRECTIVE 11R, *supra* note 36.

In all these respects, the debtor's position is very different under BAPCPA. Under BAPCPA, the means testing provisions are not applied unless the debtor's income is at least equal to the median income of other residents in the debtor's state.¹⁰¹ Similarly, BAPCPA permits a much larger number of deductions than is available under the Canadian legislation in determining whether the debtor meets the minimum terms for a chapter 13 plan as described in section 707(b)(2)(A) of the Act.¹⁰² In fact, as Professor Tabb has noted,¹⁰³ the deductibility of payments with respect to secured obligations (seemingly without a ceiling) may err on the side of generosity and give debtors a perverse incentive to favor secured creditors in their financial planning at the expense of unsecured creditors. Canadian debtors are not exposed to this temptation because the Canadian regime does not permit these deductions. The deductibility under BAPCPA of other expenditures, which have no counterpart in the Canadian legislation (notably, fees for private schooling and ongoing charitable donations), seem to reflect both political pressures and the perception that an American debtor forced into a five-year chapter 13 plan cannot be expected to follow the spartan life style foisted on his Canadian cousin in Directive 11R in straight bankruptcy proceedings, albeit for the much shorter period of nine months.

101. This and the following data is based on Professor Tabb's excellent analysis. *Tabb, supra* note 90, at 41.

102. *Id.* at 45-53.

103. *Id.* at 51-52.

APPENDIX 1: BANKRUPTCY AND INSOLVENCY ACT, SECTION 68¹⁰⁴

Directives re standard of living factors

68. (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.

Interpretation

(2) For the purposes of this section,

(a) “total income” referred to in subsection (1) includes, notwithstanding paragraphs 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source; and

(b) a requirement that a bankrupt pay an amount to the estate of the bankrupt is enforceable against all property of the bankrupt, other than property referred to in paragraphs 67(1)(b) and (b.1).

Trustee to fix amount to be paid

(3) The trustee shall

(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(b) inform the official receiver in writing of the amount fixed under paragraph (a); and

(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.

Modification by trustee

(4) The trustee may, at any time, amend an amount fixed under subsection (3) to take into account

(a) material changes that have occurred in the personal or family situation of the bankrupt; or

104. BIA, R.S.C. 1985, c. B-3, s. 68, as am. by S.C. 1992, c. 27; S.C. 1997, c. 12.

(b) a recommendation made by the official receiver under subsection (5).

Official receiver recommendation

(5) Where the official receiver determines that the amount required to be paid by the bankrupt under subsection (3) or (4) is substantially not in accordance with the applicable standards established under subsection (1), the official receiver shall recommend to the trustee and to the bankrupt an amount required to be paid that the official receiver determines is in accordance with the applicable standards.

Trustee may request mediation

(6) Where the trustee and the bankrupt are not in agreement with the amount that the bankrupt is required to pay under subsection (3) or (4), the trustee shall, forthwith, in the prescribed form, send to the official receiver a request that the matter be determined by mediation and send a copy of the request to the bankrupt.

Creditor may request mediation

(7) On the request in writing of a creditor made within thirty days after the date of bankruptcy or an amendment referred to in subsection (4), the trustee shall, within the five days following the thirty day period, send to the official receiver a request in the prescribed form that the matter of the amount the bankrupt is required to pay under subsection (3) or (4) be determined by mediation and send a copy of the request to the bankrupt and the creditor.

Mediation procedure

(8) A mediation shall be in accordance with prescribed procedures.

File

(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

Court determination

(10) Where

(a) the trustee has not implemented a recommendation made by the official receiver under subsection (5),

(b) the issue submitted to mediation requested under subsection (6) or (7) is not thereby resolved, or

(c) the bankrupt fails to comply with the requirement to pay as determined under this section,

the trustee may, or on the request of the inspectors, any of the creditors or the official receiver shall, apply to the court for the hearing of the matter, and the court may, on the hearing, in accordance with the standards established under subsection (1) and having regard to the personal and family situation of the bankrupt, by order, fix the amount that the bankrupt is required to pay to the estate of the bankrupt.

Fixing fair and reasonable remuneration in the case of related persons

(11) The court may fix an amount that is fair and reasonable

(a) as salary, wages or other remuneration for the services being performed by a bankrupt for a person employing the bankrupt, or

(b) as payment for or commission in respect of any services being performed by a bankrupt for a person,

where the person is related to the bankrupt, and the court may, by order, determine the part of the salary, wages or other remuneration, or the part of the payment or commission, that shall be paid to the trustee on the basis of the amount so fixed by the court, unless it appears to the court that the services have been performed for the benefit of the bankrupt and are not of any substantial benefit to the person for whom they were performed.

Modification of order

(12) On the application of any interested person, the court may, at any time, amend an order made under this section to take into account material changes that have occurred in the personal or family situation of the bankrupt.

Default by other person

(13) An order of the court made under this section may be served on a person from whom the bankrupt is entitled to receive money and, in such case,

(a) the order binds the person to pay to the estate of the bankrupt the amount fixed by the order; and

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(b) if the person fails to comply with the terms of the order, the court may, on the application of the trustee, order the person to pay the trustee the amount of money that the estate of the bankrupt would have received had the person complied with the terms of the order.

Application is a proceeding

(14) For the purposes of section 38, an application referred to in subsection (10) is deemed to be a proceeding for the benefit of the estate.

R.S., 1985, c. B-3, s. 68; 1992, c. 27, s. 34; 1997, c. 12, s. 60.

APPENDIX 2: O.S.B. DIRECTIVE NO. 11R—SURPLUS INCOME

Issued: October 3, 2000 and updated January 23, 2006

Interpretation

1. In this Directive,

“Act” means the *Bankruptcy and Insolvency Act*;

“Superintendent’s standards” refers to the table set out in Appendix A of this Directive.

Purpose

2. The purpose of this Directive, issued pursuant to paragraph 5(4)(c) and section 68 of the Act, is to assist the trustee in determining equitably and consistently the portion of the bankrupt’s income that should be paid into the bankrupt’s estate.

Sections of the Act concerned

Sections 68 and 170.1.

Background

3. Subsection 68(3) of the Act states:

“The trustee shall

(a) having regard to the applicable standards established under subsection (1), and to the personal and family situation of the bankrupt, fix the amount that the bankrupt is required to pay to the estate of the bankrupt;

(b) inform the official receiver in writing of the amount fixed under paragraph (a); and

(c) take reasonable measures to ensure that the bankrupt complies with the requirement to pay.”

Family Unit

4. In determining the bankrupt’s personal and family situation, it is necessary to establish the earnings and expenses of both the bankrupt and the bankrupt’s family unit. The bankrupt must disclose the earnings and expenses of each member of the family unit. As well, the trustee

may question each member of the family unit as to their earnings and expenses.

5. For the purposes of this Directive, the bankrupt's family unit includes, in addition to the bankrupt, any persons who reside in the same household and who benefit from either the expenses incurred or income earned by the bankrupt, or who contribute to such expenses or earnings. A person who does not reside in the same household shall be considered as a member of the family unit if the person benefits from, or participates in, the bankrupt's income or expenses.

Calculation

6. (1) In order to apply the Superintendent's standards (Appendix A), the bankrupt shall first complete the income and expense statement of the family unit, including the bankrupt, in Form 65 entitled *Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt*.

6. (2) The family unit's total monthly income shall be determined by subtracting from the total of all its members' monthly incomes the following amounts, as applicable:

a. In the case of a salaried employee, minimum statutory remittances (income tax, pension and employment insurance deductions) and other mandatory deductions paid; or

b. in the case of a person who is self-employed, business expenses and deductions as permitted by the *Income Tax Act* or similar provincial legislation, minimum statutory remittances and installment tax payments.

6. (3) The family unit's available monthly income is determined by subtracting from the family unit's total monthly income the monthly non-discretionary expenses applicable to the personal and family situations of both the bankrupt and the bankrupt's family unit:

a. child support payments;

b. spousal support payments;

c. child care expenses;

d. expenses associated with a medical condition;

e. court-imposed fines or penalties that are in process of being paid;

f. expenses permitted by the *Income Tax Act* (or similar provincial legislation) that are a condition of employment; or

g. any other debt where a stay of proceedings has been lifted by the court, and a recourse authorized.

6. (4) The trustee shall verify the accuracy of the income and expense statement submitted by the bankrupt by requiring that the bankrupt provide:

a. proof of payments made pursuant to subsections (2) and (3) above;

b. proof of income.

7. (1) The trustee determines the bankrupt's total monthly surplus income by subtracting from the family unit's available monthly income the amount which, according to the standards, corresponds to the number of persons in the family unit, as set out in Appendix A.

7. (2)(a) Where the bankrupt's total monthly surplus income is equal to or greater than \$100 and less than \$1,000, 50% of the amount determined in subsection (1) shall be required from the bankrupt;

(b) Where the bankrupt's total monthly surplus income is equal to or greater than \$1,000, at least 50%, but no more than 75% of the amount determined in subsection (1), shall be required from the bankrupt.

Family Situation Adjustment

8. The amount that the bankrupt is required to pay to the bankrupt's estate shall be adjusted to the same percentage as the bankrupt's portion of the family unit's available monthly income.

9. For the purposes of this Directive and subsection 68(3) of the Act, when the trustee has determined the amount the bankrupt is required to pay to the bankrupt's estate, the trustee shall inform the Official Receiver of that amount, in Form 65 entitled *Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt*.

Example (Family unit of 2)

Bankrupt's available monthly income:	\$1800
Other family unit member's available monthly income:	<u>\$1000</u>
Family unit's available monthly income:	\$2800

Minus the Superintendent's standard for a family unit of 2 as per Appendix A:	\$2194
	<hr style="border-top: 3px double black;"/>
Total monthly surplus income	\$606
Bankrupt's portion of the family unit's monthly income ($1800 \div 2800 = 64.3\%$)	
Payment required from bankrupt, as per paragraph 7(2)(a) of the Directive [($606 \times 64.3\%$) $\times 50\%$ = 194.82]	\$195

10. Where a person considered to be a member of the family unit as defined in section 5, who is not a bankrupt, refuses or neglects to divulge his or her family income and expenses, for the purposes of subsection 7(1), this person is deemed not to be a member of the family unit. The trustee shall describe these circumstances in Form 65 entitled *Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt* and in Form 82 entitled *Report of Trustee on Bankrupt's Application for Discharge*.

Irregular Income

11. When a bankrupt's income is irregular (e.g., sale commissions or seasonal employment), the amount that the bankrupt is required to pay to the bankrupt's estate may be deferred until the time of preparation of Form 82 entitled *Report of Trustee on Bankrupt's Application for Discharge*, if necessary. At that time, the average income for the period of bankruptcy would be considered for the purpose of determining the amount that the bankrupt is required to pay to the bankrupt's estate and a conditional discharge shall be recommended by the trustee for the total amount, if this has not already been paid.

12. The trustee shall comment on this situation when dealing with surplus income in Form 82 entitled *Report of Trustee on Bankrupt's Application for Discharge*.

Example

An individual with no regular income, but an occasional sales commission, files an assignment in bankruptcy. During the eighth month of bankruptcy, the bankrupt receives three commissions in the amount of \$6,000, \$4,000 and \$8,000 for a total of \$18,000. The monthly average during the nine month period of bankruptcy would be \$2,000, and the total monthly surplus income determination would be made retroactively with a recommendation for a conditional discharge being made in the amount of the determined surplus.

Discontinuation of payments

13. The payments which the bankrupt is required to make to the bankrupt's estate shall cease upon the discharge of the bankrupt, or as otherwise ordered by the court.

Marc Mayrand
Superintendent of Bankruptcy
Att.

APPENDIX "A" SUPERINTENDENT'S STANDARDS—2006

TOTAL MONTHLY SURPLUS INCOME

Persons	\$	Family Unit's Available Monthly Income																
		1855	1955	2055	2155	2255	2455	2655	2855	3055	3255	3455	3655	3855	4055	4255	4455	4655
1	1755	100	200	300	400	500	700	900	1100	1300	1500	1700	1900	2100	2300	2500	2700	2900
2	2194	0	0	0	0	0	261	461	661	861	1061	1261	1461	1661	1861	2061	2261	2461
3	2729	0	0	0	0	0	0	126	326	526	726	926	1126	1326	1526	1726	1926	
4	3303	0	0	0	0	0	0	0	0	0	152	352	552	752	952	1152	1352	
5	3693	0	0	0	0	0	0	0	0	0	0	0	163	363	563	763	963	
6	4082	0	0	0	0	0	0	0	0	0	0	0	0	0	173	373	573	
7 or +	4471	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	184

The Superintendent's Standards ("S") are derived from the Low Income Cutoffs (LICO) released by Statistics Canada. The Superintendent uses the before-tax LICO for urban areas 500,000 people and over. The 2006 standards are updated adding to the 2001 LICO the 2002, 2003, 2004, and 2005 Consumer Price Index (CPI), 2.2%, 2.7%, 1.9% and 2.2% plus a 1.9% adjustment reflecting the 2006 CPI expectation.

The amounts shown above represent the monthly total surplus income of the bankrupt over the standards, from which the surplus income payment should be calculated.

APPENDIX 3: FORM 65

FORM 65

Monthly Income and Expense Statement of the Bankrupt and the Family Unit and Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt (Section 68 and Subsection 102(3) of the Act and Rule 105(4))

(Title Form 1)

The information concerning the monthly income and expense statement of the bankrupt and the family unit, the financial situation of the bankrupt and the bankrupt's obligation to make payments required under section 68 of the Act to the estate of the bankrupt are as follows:

Table with 4 columns: MONTHLY INCOME, Bankrupt, Other members of the family unit, Total. Rows include Net employment income, Net pension/Annuities, Net child support, Net spousal support, Net employment insurance benefits, Net social assistance, Self-employment income, Gross Net, Other net income, TOTAL MONTHLY INCOME, MONTHLY NON-DISCRETIONARY EXPENSES, TOTAL MONTHLY NON-DISCRETIONARY EXPENSES, AVAILABLE MONTHLY INCOME OF THE BANKRUPT, AVAILABLE MONTHLY INCOME OF THE FAMILY UNIT, and BANKRUPT'S PORTION OF THE AVAILABLE MONTHLY FAMILY UNIT INCOME.

**If one or more members of the family unit have refused to divulge this information, please provide details as required by section 10 of Directive 11R.

FORM 65 -- Concluded

MONTHLY DISCRETIONARY EXPENSES: (Family unit)

Housing expenses		Living expenses	
Rent/Mortgage/Hypothec	_____	Food/Grocery	_____
Property taxes/Condo fees	_____	Laundry/Dry cleaning	_____
Heating/Gas/Oil	_____	Grooming/Toiletries	_____
Telephone	_____	Clothing	_____
Cable	_____	Other	_____
Hydro	_____	Transportation expenses	
Water	_____	Car lease/Payments	_____
Furniture	_____	Repair/ Maintenance/Gas	_____
Other	_____	Public transportation	_____
Personal expenses		Other	_____
Smoking	_____	Insurance expenses	
Alcohol	_____	Vehicle	_____
Dining/Lunches/Restaurants	_____	House	_____
Entertainment/Sports	_____	Furniture/Contents	_____
Gifts/Charitable donations	_____	Life insurance	_____
Allowances	_____	Other	_____
Other	_____	Payments	
Non-recoverable medical expenses		To the estate	_____
Prescriptions	_____	To secured creditor	_____
Dental	_____	(Other than mortgage and vehicle)	_____
Other	_____	Other	_____
TOTAL MONTHLY DISCRETIONARY EXPENSES (FAMILY UNIT)		- \$ _____(10)	
MONTHLY SURPLUS OR (DEFICIT) FAMILY UNIT ((8) - (10))		= \$ _____(11)	

Information (or Amended Information) Concerning the Financial Situation of the Individual Bankrupt

Payments to the estate as per agreement

Number of persons in household family unit, including bankrupt: _____	
Total amount bankrupt has agreed to pay monthly	_____ (12)
Amount bankrupt has agreed to pay monthly to repurchase assets	
(provide details)	_____ (13)
Residual amount paid into the estate ((12) - (13))	_____ (14)

Payments required by the Directive on Surplus Income

Monthly amount required by the Directive on Surplus Income based on percentage established on line (9)	_____ (15)
Difference between amounts at lines (14) and (15)	_____ (16)
Other applicable comments: (If amount at line (14) is less than amount at line (15), explain why the required payments are not being made: _____)	
Amendment or material change: (If the information relates to a material change or an amendment, provide details: _____)	

Dated at _____, this _____ day of _____.

Trustee

Bankrupt

Notes: In a joint assignment, only one form is required and each debtor's monthly income and non-discretionary expenses have to be explained in detail.

If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

APPENDIX 4:
BANKRUPTCY AND INSOLVENCY ACT, PART VI, SS. 168.1–170.1¹⁰⁵

First-time individual bankrupt

168.1 (1) Except as provided in subsection (2), the following provisions apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction:

(a) the trustee shall, before the end of the eight-month period immediately following the date on which a bankruptcy order is made against, or an assignment is made by, the individual bankrupt, file a report prepared under subsection 170(1) with the Superintendent and send a copy of the report to the bankrupt and to each creditor who requested a copy;

(a.1) the trustee shall, not less than fifteen days before the date of automatic discharge provided for in paragraph (f), give notice of the impending discharge, in the prescribed form, to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address;

(b) where the Superintendent intends to oppose the discharge of the bankrupt, the Superintendent shall give notice of the intended opposition, stating the grounds therefore, to the trustee and to the bankrupt at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(c) where a creditor intends to oppose the discharge of the bankrupt, the creditor shall give notice of the intended opposition, stating the grounds therefore, to the Superintendent, to the trustee and to the bankrupt at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(d) where the trustee intends to oppose the discharge of the bankrupt, the trustee shall give notice of the intended opposition in prescribed form and manner, stating the grounds therefor, to the bankrupt and the Superintendent at any time prior to the expiration of the nine month period immediately following the bankruptcy;

(e) where the Superintendent, the trustee or a creditor opposes the discharge of the bankrupt, the trustee shall, unless the matter is to be dealt with by mediation under section 170.1, forthwith apply to

105. BIA, R.S.C. 1985, c. B-3, ss. 168.1–170.1.

the court for an appointment for the hearing of the opposition in the manner referred to in sections 169 to 176, which hearing shall be held

(i) within thirty days after the day the appointment is made, or

(ii) at such later time as may be fixed by the court at the request of the bankrupt or the trustee; and

(f) where the Superintendent, the trustee or a creditor has not opposed the discharge of the bankrupt in the nine month period immediately following the bankruptcy, then, subject to subsection 157.1(3),

(i) on the expiration of that nine month period, the bankrupt is automatically discharged, and

(ii) forthwith after the expiration of that nine month period, the trustee shall issue a certificate to the discharged bankrupt, in the prescribed form, declaring that the bankrupt is discharged and is released from all debts except those matters referred to in subsection 178(1), and shall send a copy of the certificate to the Superintendent.

Application not precluded

(2) Nothing in subsection (1) precludes an individual bankrupt from applying to the court for discharge before the expiration of the nine month period immediately following the bankruptcy, and subsection (1) ceases to apply to an individual bankrupt who makes such an application before the expiration of that period.

Application of other provisions

(3) The provisions of this Act concerning the discharge of bankrupts apply in respect of an individual bankrupt who has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction, to the extent that those provisions are not inconsistent with this section, whether or not the bankrupt applies to the court for a discharge referred to in subsection (2).

Effect of automatic discharge

(4) An automatic discharge by virtue of paragraph (1)(f) is deemed, for all purposes, to be an absolute and immediate order of discharge.

1992, c. 27, s. 61; 1997, c. 12, s. 98; 2004, c. 25, s. 81.

Bankruptcy to operate as application for discharge

169. (1) Subject to section 168.1, the making of a bankruptcy order against, or an assignment by, any person except a corporation operates as an application for discharge, unless the bankrupt, by notice in writing, files in the court and serves on the trustee a waiver of application before being served by the trustee with a notice of the trustee's intention to apply to the court for an appointment for the hearing of the application as provided in this section.

Appointment to be obtained by trustee

(2) The trustee, before proceeding to the discharge and in any case not earlier than three months and not later than one year following the bankruptcy of any person who has not served a notice of waiver on the trustee, shall on five days notice to the bankrupt apply to the court for an appointment for a hearing of the application on a date not more than thirty days after the date of the appointment or at such other time as may be fixed by the court at the request of the bankrupt or trustee.

Application for discharge

(3) A bankrupt who has given a notice of waiver as provided in subsection (1) may, at any time at the bankrupt's own expense, apply for a discharge by obtaining from the court an appointment for a hearing, which shall be served on the trustee not less than twenty-one days before the date fixed for the hearing of the application, and the trustee on being served therewith shall proceed as provided in this section.

Bankrupt corporation

(4) A bankrupt corporation may not apply for a discharge unless it has satisfied the claims of its creditors in full.

Fees and disbursements of trustee

(5) The court may, before issuing an appointment for hearing on application for discharge, if requested by the trustee, require such funds to be deposited with, or such guarantee to be given to, the trustee, as it deems proper, for the payment of his fees and disbursements incurred in respect of the application.

Notice to creditors

(6) The trustee, on obtaining or being served with an appointment for hearing on application for discharge, shall, not less than fifteen days be-

fore the day appointed for the hearing of the application, send a notice thereof in the prescribed form to the Superintendent, the bankrupt and every creditor who has proved a claim, at the creditor's latest known address.

Procedure when trustee not available

(7) Where the trustee is not available to perform the duties required of a trustee on the application of a bankrupt for a discharge, the court may authorize any other person to perform such duties and may give such directions as it deems necessary to enable the application of the bankrupt to be brought before the court.

R.S., 1985, c. B-3, s. 169; 1992, c. 27, s. 62; 1997, c. 12, s. 99; 2004, c. 25, s. 82.

Trustee to prepare report

170. (1) The trustee shall prepare a report in the prescribed form with respect to

- (a) the affairs of the bankrupt,
- (b) the causes of his bankruptcy,
- (c) the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the court,
- (d) the conduct of the bankrupt both before and after the date of the initial bankruptcy event,
- (e) whether the bankrupt has been convicted of any offence under this Act, and
- (f) any other fact, matter or circumstance that would justify the court in refusing an unconditional order of discharge, and the report shall be accompanied by a resolution of the inspectors declaring whether or not they approve or disapprove of the report, and in the latter case the reasons of the disapproval shall be given.

Filing and service of report

(2) Where an application of a bankrupt for a discharge is pending, the trustee shall file the report prepared under subsection (1) in the court not less than two days, and forward a copy thereof to the Superintendent, to the bankrupt and to each creditor who requested a copy not less than ten days, before the day appointed for hearing the application, and in all other cases the trustee, before proceeding to the discharge, shall file the report in the court and forward a copy to the Superintendent.

Superintendent may file report

(3) The Superintendent may make such further or other report to the court as he deems expedient or as in his opinion ought to be before the court on the application referred to in subsection (2).

Representation by counsel

(4) The trustee or any creditor may attend the court and be heard in person or by counsel.

Evidence at hearing

(5) For the purposes of the application referred to in subsection (2), the report of the trustee is evidence of the statements therein contained.

Right of bankrupt to oppose statements in report

(6) Where a bankrupt intends to dispute any statement contained in the trustee's report prepared under subsection (1), the bankrupt shall at or before the time appointed for hearing the application for discharge give notice in writing to the trustee specifying the statements in the report that he proposes at the hearing to dispute.

Right of creditors to oppose

(7) A creditor who intends to oppose the discharge of a bankrupt on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof to the trustee and to the bankrupt at or before the time appointed for the hearing of the application for discharge.

R.S., 1985, c. B-3, s. 170; 1997, c. 12, s. 100.

Recommendation

170.1 (1) The report prepared under subsection 170(1) shall include a recommendation as to whether or not the bankrupt should be discharged subject to conditions, having regard to the bankrupt's conduct and ability to make payments.

Factors to be considered

(2) The trustee shall consider the following matters in making a recommendation under subsection (1):

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- (a) whether the bankrupt has complied with a requirement imposed on the bankrupt under section 68;
- (b) the total amount paid to the estate by the bankrupt, having regard to the bankrupt's indebtedness and financial resources; and
- (c) whether the bankrupt, if the bankrupt could have made a viable proposal, chose to proceed to bankruptcy rather than to make a proposal as the means to resolve the indebtedness.

Presumption

(3) A recommendation that the bankrupt be discharged subject to conditions is deemed to be an opposition to the discharge of the bankrupt.

Request for mediation

(4) Where the bankrupt does not agree with the recommendation of the trustee, the bankrupt may, before the expiration of the ninth month after the date of the bankruptcy, send the trustee a request in writing to have the matter determined by mediation.

Mediation request to be sent to official receiver

(5) Where a request for mediation has been made under subsection (4) or the discharge of the bankrupt is opposed by a creditor or the trustee in whole or in part on a ground referred to in paragraph 173(1)(m) or (n), the trustee shall send an application for mediation in prescribed form to the official receiver within five days after the expiration of the nine month period referred to in subsection (4) or within such further time as the official receiver may allow.

Mediation procedure

(6) A mediation shall be in accordance with prescribed procedures.

Court hearing

(7) Where the issues submitted to mediation are not thereby resolved or the bankrupt has failed to comply with conditions that were established by the trustee or as a result of the mediation, the trustee shall forthwith apply to the court for an appointment for the hearing of the matter, which hearing shall be held

- (a) within thirty days after the day the appointment is made, or

(b) at such later time as may be fixed by the court,

and the provisions of this Part relating to applications to the court in relation to the discharge of a bankrupt apply, with such modifications as the circumstances require, in respect of an application to the court under this subsection.

Certificate of discharge

(8) Where the bankrupt complies with the conditions imposed on the bankrupt by the trustee in relation to the discharge of the bankrupt or as a result of mediation referred to in this section, the trustee shall

(a) issue to the bankrupt a certificate of discharge in the prescribed form releasing the bankrupt from all debts other than a debt referred to in subsection 178(1); and

(b) send a copy of the certificate of discharge to the Superintendent.

File

(9) Documents contained in a file on the mediation of a matter under this section form part of the records referred to in subsection 11.1(2).

1997, c. 12, s. 101.

APPENDIX 5: FORM 82

FORM 82

Report of Trustee on Bankrupt's
Application for Discharge
(Subsection 170(1) of the Act)

(Title Form 1)

Date of bankruptcy:		Date of initial bankruptcy event:	
Marital status:			
Type of employment:	Number of persons in household family unit, including bankrupt:		
AMOUNT OF LIABILITIES			
	Secured	Preferred	Unsecured
Declared	\$	\$	\$
Proven	\$	\$	\$
AMOUNT OF ASSETS			
Description	Value as per Statement of Affairs	Amount realized	Estimate of assets to be realized
	\$	\$	\$
TOTAL			
ANTICIPATED RATE OF DIVIDENDS			
Preferred creditors:		Unsecured creditors:	

A: CAUSES OF BANKRUPTCY

1. Provide details of the causes of bankruptcy:

B: INFORMATION CONCERNING THE FINANCIAL SITUATION *(The same method of calculation must be used to establish the available monthly income of the bankrupt and the family unit at date of bankruptcy and at date of this report. Explain any material changes.)*

2. (a) Available monthly income of the bankrupt at date of bankruptcy
(Same amount as line (7) on Form 65): \$ _____
- (b) Available monthly income of the bankrupt at date of this report: \$ _____
3. (a) Available monthly income of the family unit at date of bankruptcy
(Same amount as line (8) on Form 65): \$ _____
- (b) Available monthly income of the family unit at date of this report: \$ _____

FORM 82 -- Continued

C: CONDUCT OF THE BANKRUPT

- 4. (a) Was the bankrupt required to pay to the estate an amount established by the Directive on Surplus Income? *(If yes, attach Appendix A)* Yes No
 (b) Could the bankrupt have made a viable proposal rather than proceeding with bankruptcy? *(If yes, attach Appendix A)* Yes No
- 5. (a) Did the bankrupt fail to perform any of the duties imposed on the bankrupt under the Act? *(If yes, provide details)* Yes No
 (b) Can the bankrupt be justly held responsible for any of the facts referred pursuant to section 173 of the Act? *(If yes, provide details)* Yes No
 (c) Did the bankrupt commit any offence in connection with the bankruptcy? *(If yes, provide details)* Yes No
- 6. (a) Did the bankrupt ever make a proposal under the *Bankruptcy and Insolvency Act*? *(If yes, provide details)* Yes No
 (b) Has the bankrupt been bankrupt before either in Canada or elsewhere? *(If yes, provide details)* Yes No
- 7. Were inspectors appointed in this estate? *(Provide details if the trustee has reasonable grounds to believe that the inspectors will not approve this report. Attach a copy of the resolution.)* Yes No

D: DISCHARGE OF THE BANKRUPT

- 8. (a) Is it the intention of the trustee to oppose the bankrupt's discharge? *(If yes, provide details)* Yes No
 (b) Does the trustee have reasonable grounds to believe that a creditor or the Superintendent will oppose the bankrupt's discharge for a reason other than those set out in section 173(1)(m) or (n) of the Act? *(If yes, provide details)* Yes No
- 9. Did the bankrupt refuse or neglect to receive counselling pursuant to the Directive on Counselling in insolvency matters? *(If yes, provide details)* Yes No
- 10. Are there other facts, matters or circumstances that would justify the Court in refusing an absolute order of discharge? *(If yes, provide details)* Yes No
- 11. Other pertinent information? *(e.g. Exceptional personal circumstances, preferential payments, etc. If yes, provide details.)* Yes No

Additional details as required

<u>Number</u>	<u>Additional information</u>

Dated at _____, this ____ day of _____, _____.

Trustee

FORM 82 -- Concluded

APPENDIX A

A: AMOUNT REQUIRED TO BE PAID MONTHLY BY THE BANKRUPT

Monthly amount required by the Directive on Surplus Income <i>(Same amount as line (13) on Form 65):</i>	\$ _____	(1)
Amount bankrupt has agreed to pay monthly <i>(Same amount as line (14) on Form 65):</i>	\$ _____	(2)
Difference between amounts at lines (1) and (2):	\$ _____	
Amount bankrupt has agreed to pay monthly to repurchase assets <i>(Same amount as line (13) on Form 65, provide details):</i>	\$ _____	(3)
Total anticipated payments, lines (2) + (3):	\$ _____	

B: SURPLUS INCOME

1. Did bankrupt make all required payments pursuant to section 68 of the Act? *(If no, provide details)* No Yes
2. Does amount established to be paid correspond with Directive on Surplus Income?
(If no, provide details of any extenuating circumstances that would affect amount to be paid as per Directive) No Yes
3. Was the bankrupt made aware of the possibility of requesting mediation? No Yes
4. Any amendment or material changes during period of bankruptcy? *(If yes, provide details)* Yes No
5. Was mediation necessary under subsection 68(6) or 68(7) of the Act to determine the amount to be paid by the bankrupt? Yes No

C: RECOMMENDATION ON THE BANKRUPT'S DISCHARGE

*(Do not complete this part if:
-the bankrupt has previously been a bankrupt;
-the discharge of the bankrupt is opposed on grounds other than those mentioned at section 170.1 of the Act; or
-the bankrupt has refused or neglected to receive counselling pursuant to the Directive on Counselling in insolvency matters)*

6. Recommendation of the trustee pursuant to section 170.1 of the Act:
 - bankrupt to be discharged without conditions; *(Provide justification for unconditional discharge)*
 - bankrupt to be discharged subject to conditions (deemed opposition) based on the following grounds under subsection 170.1(2) of the Act; *(Provide details, amount and period of payments)*
 - the bankrupt has not complied with a requirement imposed on the bankrupt under section 68 of the Act;
 - the total amount paid to the estate by the bankrupt is disproportionate in relation to the bankrupt's indebtedness and financial resources;
 - the bankrupt could have made a viable proposal, but chose to proceed with bankruptcy, rather than make a proposal as the means to resolve the indebtedness;
 - bankrupt to be discharged after fulfilling obligations under mediation agreement. *(Provide details, amount and period of payments.)*
7. Does the trustee have reasonable grounds to believe that the debtor agrees to the conditions recommended by the trustee? Yes No
8. Was the bankrupt made aware of the possibility of requesting mediation? Yes No

Dated at _____, this ____ day of _____, _____.

Trustee

NOTE: If a copy of this Form is sent electronically by means such as email, the name and contact information of the sender, prescribed in Form 1.1, must be added at the end of the document.

